United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2324

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2324

LUMUMBA SHAKUR, et al.,

Plaintiffs-Appellees,

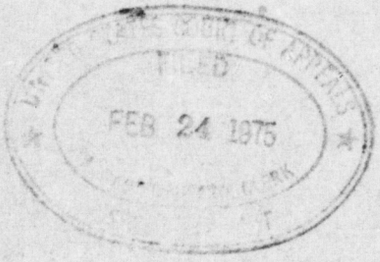
v.

GEORGE F. McGRATH, et al.,

Defendants-Appellants

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF FOR APPELLEES



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Issues Presented For Review

1. Whether the City of New York will be liable, under General Municipal Law § 50-d, to indemnify defendants Ralph Plew, M.D., or "John" Collins, M.D., if they are adjudged liable to plaintiff Lee Berry for medical malpractice.[1/]

2. Whether the City of New York will be liable under

1/ This question, and the question of whether the pendant medical malpractice claims should be dismissed, Appellants' Brief, pp. 5, 12, both turn on whether there was compliance with section 50-e. See p. 7 infra.

General Municipal Law § 50-d, to indemnify defendants Ralph Plew, M.D., or "John" Collins, M.D., if they are adjudged liable to plaintiff Lee Berry for medical malpractice under such circumstances or with such a motivation as to constitute a violation of Berry's federally protected rights.

Statement Of The Case

This action arose in 1969 out of the arrest and incarceration of the 12 plaintiffs on state charges of conspiracy and related criminal acts. All but one of the plaintiffs were members of an organization known as the Black Panther Party for Self Defense. The original complaint sought damages and injunctive relief because of the conditions under which plaintiffs were confined in various New York City jails, and because of the inadequate medical attention given to plaintiff Lee Berry. The defendants are employees of the New York City Department of Corrections, several of them doctors. As a result of earlier stages of this litigation, most of the prison conditions of which plaintiffs complained were remedied. On May 13, 1971, after a celebrated trial, a state jury acquitted the plaintiffs[2/] of all the criminal charges.[3/]

2/ Plaintiff Berry's medical condition deteriorated so badly as a result of the alleged malpractice that he was unable to stand trial. The state voluntarily dismissed all charges against Berry following the acquittal of the other defendants.

3/ See Zimroth, P. , Perversions of Justice; the Prosecution and Acquittal of the Panther 21 (1954).

The acquittal rendered moot the claim in the instant action for injunctive relief; the issue of damages remains.[4/]

After the completion of discovery, a question arose in the District Court proceedings as to whether the City of New York might ultimately be obligated to indemnify the doctor defendants, Ralph Plew, M.D. and "John" Collins, M.D. Although the City of New York is not a named defendant in this action, section 50-d of the General Municipal Law requires the City under certain circumstances to indemnify doctors held liable for medical malpractice in City institutions. Counsel for plaintiffs and defendants, after extended discussions, concluded that, if the City were indeed so liable, this action could be resolved without recourse to trial through a direct settlement between plaintiffs and the City. The parties were in disagreement, however, as to whether the City would be liable to indemnify the doctors, and agreed to seek a definitive resolution of this matter by the court.

The parties brought this matter to the attention of the District Court in early 1974 at two pre-trial conferences and through a series of letters. On May 15, 1974, Judge Knapp issued sua sponte an order holding that the

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4/ A related action regarding the unusually high bail set in the criminal cases was previously before this Court sub nom. United States ex rel. Shakur v. McGrath, 418 F.2d 243 (2d Cir. 1969), cert. den. 397 U.S. 999 (1970).

City would not be liable to indemnify the doctors (8a). Thereafter, at the request of plaintiffs, Judge Knapp set the matter for reconsideration on cross motions by the parties. Plaintiffs moved for an order that the City would be liable to indemnify the doctors (14a); the defendants, represented by the New York City Corporation Counsel, moved to dismiss the malpractice claim against the doctors. After notice and hearing the District Court held on August 1, 1974, that the City was indeed liable to indemnify the doctors (9a-18a).

Judge Knapp certified in his opinion that an immediate appeal would "materially advance the ultimate termination of the litigation." (13a). On August 9, 1974, defendants petitioned this Court for leave to appeal Judge Knapp's decision of August 1, 1974. On August 19, 1974, counsel for plaintiffs advised the Court by letter that plaintiffs supported the petition. Leave to appeal was granted on October 2, 1974.(7a).

Statement Of The Facts

The allegations regarding plaintiff Berry, which for the purposes of this appeal must be assumed to be true, are as follows. Lee Berry, prior to, during, and subsequent to the events from which this action arose was an epileptic subject to serious, and potentially fatal, grand mal seizures. Prior to his imprisonment Mr. Berry was already so severely handicapped by the disease that he was receiving a 70% permanent disability pension from the Army. On April 2, 1969,

when he was indicted along with the other plaintiffs, Mr. Berry was in the Veterans Administration Hospital in New York being treated for epilepsy. The next day Mr. Berry's mother called him at the hospital and told him the police were looking for him. Mr. Berry voluntarily telephoned the police and told them where he was. Berry was immediately arrested, removed from the hospital, and incarcerated in the Manhattan's Men's House of Detention (the "Tombs"). Despite his illness and voluntary surrender, Mr. Berry's bail was set at $100,000.

From April to July of 1969, plaintiff Berry, despite his repeated requests, was denied both medication and the assistance of a physician. Beginning in July 1969, as the result of a court order, Berry received some limited medication, but his condition continued to deteriorate. During the period from his arrest until November, 1969, when he was transferred to Bellevue Hospital, plaintiff had an average of two epileptic seizures a week, frequently waking in a pool of blood. On July 22, after being beaten by a guard, he was placed in solitary confinement and thereafter denied most of his medication.

On November 24, 1969, again pursuant to a court order, plaintiff was transferred to the prison ward at Bellevue Hospital. He quickly developed a high fever and was semi-comatose for almost a month. On December 25 he developed severe cramps, and the next day his appendix was removed. The pathologist subsequently found that

there was nothing wrong with the appendix. As a result of the operation he developed severe pneumonia as well as clotting in the groin area. On January 9, 1970, he was operated on for this latter condition. Later in January Berry was found to have an abscess in his lung.

On March 11, 1970, without advance notice, plaintiff was transferred to the Riker's Island Prison infirmary. No medical records accompanied his transfer, and all medication was discontinued. Armed with yet another court order, Berry's physician, Dr. Cordice, visited him at Riker's Island and diagnosed a potentially fatal thrombosis in Berry's left leg.[5/] On March 19 Berry was transferred back to the prison ward at Bellevue Hospital. On April 23, 1970, pursuant to a writ of habeas corpus, Berry's bail was reduced to $5,000 and he was released to undergo private medical treatment. Berry's prosecution was severed from the other defendants when he proved too ill to stand trial, and all charges against him were dismissed after the acquittal of the other defendants. The damage produced by the year in which Berry was imprisoned, including the aggravation of his epilepsy, the abscess in his lung, and a thrombosis in his left leg, appear to be permanent.

These allegations involve, not ordinary malpractice, but willful refusal to provide treatment for

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5/ This is the same malady for which former President Nixon was treated under rather different conditions.

a known medical problem, deliberate indifference to medical needs, and willful disregard of medical instructions by previous doctors or specialists. Plaintiff claims that the allegations, if proven, would entail a violation of his Eighth Amendment Rights, and thus constitute a cause of action under the 42 U.S.C. § 1983.[6/] The complaint also asserts a state cause of action for malpractice, over which the District Court had pendant jurisdiction.

ARGUMENT

1. THE DOCTORS ARE ENTITLED TO INDEMNIFICATION FOR ANY JUDGMENT OBTAINED FOR MALPRACTICE

Section 50-d(1) of the General Municipal Law expressly provides that a city must indemnify, "to the extent that it shall save him harmless," any physician held liable in damages for malpractice while treating a patient in a city institution. Section 50-d(2) further provides, however, that no action may be brought against either the city or the doctor unless the plaintiff has given the city prior notice of that claim in the manner set out in section 50-e. The question of whether New York City must indemnify the doctors for any ordinary malpractice judgment and the question of whether the pendant state

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6/ See generally Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970); United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970).

malpractice claims against the doctors must be dismissed are controlled by a single issue -- whether plaintiff substantially complied with the requirements of section 50-e.

In the instant case plaintiff Berry was under treatment in various Department of Corrections institutions from his arrest on April 3, 1969, until his release on bail to enter a private hospital on April 23, 1970. The cause of action against the doctors was added to the instant action by an amendment, filed with leave of the District Court on July 29, 1970, constituting the second amended complaint. Plaintiff Berry claims that he provided adequate and timely notice of his claim to the City in the form of a variety of documents served on the City prior to July 28, 1970 in connection with this and other legal proceedings. These documents include two affidavits by private doctors who examined Berry,[7/] four affidavits by Berry's attorneys,[8/] and the

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7/ Affidavit of Dr. William Bronston, dated August 7, 1970, p. 67a; Affidavit of Dr. John Cordice, dated April 6, 1970, p. 68a.

8/ Affidavit of Gerald B. Lefcourt, Esq., dated September 25, 1969, p. 62a; affidavit of Harold Rothwax, Esq. dated April, 1969, p. 79a; affidavit of Jonathan Shapiro, dated July 10, 1970, pp. 99a.

These three affidavits were expressly relied on by plaintiff in the District Court. A review of the record has revealed that a fourth affidavit, executed by Gerald B. Lefcourt, Esq., in May, 1969, dealt with Berry's condition and was in the possession of the Corporation Counsel no later than November 20, 1969, when Corporation Counsel annexed that affidavit to a Motion For A More Definite Statement in the instant action.

original complaint,[9] first amended complaint,[10] and a Notice of Motion[11] provided to the city at earlier stages in this litigation prior to the July 28 amendment.

1. The District Court Had Discretion In Deciding Whether Plaintiff Had Complied With Section 50-e

Where a litigant is required prior to suing to comply with the provisions of section 50-e, New York law confers broad discretion on the court in which that action is filed to deem adequate a "notice of claim" which may be technically insufficient. Subdivision 6 of section 50-e provides in part:

> At or before the trial of an action or the hearing upon a special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

Certain defects in the manner of service may also be disregarded under section 50-e(3). In the District Court plaintiff urged the court to exercise its discretion under

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9/ Filed on October 14, 1969, p. 27a.

10/ Filed December 1, 1969, p. 47a.

11/ Dated July 10, 1970, p. 95a.

subdivision 6, p. 21a, and the District Court did so, holding that the various papers served prior to the second amended complaint constituted "substantial compliance" with section 50-e. P. 11a.

A long line of state decisions has emphasized the discretion of the courts in deciding what papers may be deemed an adequate notice of claim. See e.g. Sanchez v. City of New York, 25 A.D. 2d 731, 268 N.Y.S. 2d 732 (1st Dept. 1966); Berger v. Village of Seneca Falls, 3 Misc. 2d 647, 151 N.Y.S. 2d 133 (Supreme Ct., Seneca County, 1956). In Winbush v. City of Mount Vernon, 306 N.Y. 327, 118 N.E. 2d 459 (1954) the Court of Appeals stressed that subdivision 6 is "the broadest kind of provision giving the courts discretion, in the absence of prejudice, to correct, supply, or disregard a good faith mistake, omission, irregularity or defect." 306 N.Y. at 327. In Davidson v. New York City Housing Authority, 56 Misc. 2d 635, 289 N.Y.S. 2d 677 (Supreme Ct. Kings County, 1968), the court characterized subdivision 6 as conferring on the courts "broad power" to disregard defects in a notice. 289 N.Y.S. 2d at 679.

Defendants, however, insist that the District Court had no discretion to disregard the "mistake" plaintiff had made in providing notice of claim in papers served in other litigation or earlier stages of this case. Appellants' Brief, pp. 5-7. Defendants rely on P.J. Panzeca v. Board of Education, 29 N.Y. 2d 508, 323 N.Y.S. 2d 978, 272 N.E.2d 488

(1971). Panzeca was a contract action arising under section 3813 of the Education Law, which requires that certain claims be "presented to" a school board prior to the commencement of a civil action. The Court of Appeals held that, on the facts of that case papers served in connection with certain prior litigation could not be deemed to be in compliance with the prior presentation requirement.

However, as the District Court correctly noted, section 3813 (1) contains no provision comparable to subdivision 6 of section 50-e; the discretion expressly conferred by statute in a section 50-e case does not exist in a section 3813 action. The omission appears to be quite deliberate. Section 3813(2) incorporates for certain tort actions the provisions of section 50-e, but does not do so for section 3813(1) contract actions. This distinction was critical in the litigation of Panzeca itself. The Supreme Court had upheld the notice in the form of prior court papers, asserting it had "discretion" to do so and referring to section 50-e and litigation thereunder.[12/] The defendants prevailed on appeal by stressing that the statutory provisions under 3813 (1) were different from section 50-e. In the Court of Appeals the Board of Education urged:

> Section 50-e of the General Municipal Law, which governs tort claims, accords discretion to the court, in circumstances, to permit a late filing of a claim, and to correct, supply or disregard good-faith mistakes, omissions, irregularities or defects in the notice of claim. The Legislature has not seen fit to grant the courts such discretion in contract claims governed by subdivision 1

12/ Record on Appeal, Panzeca v. Board of Education, pp. 86-88.

of section 3813 of the Education Law.[13]

To apply Panzeca to a section 50-e case would be to ignore the distinction between section 50-e and section 3813 (1) on which the decision in Panzeca was founded.

Nor does Panzeca establish a per se rule that presentation of claim otherwise sufficient under section 3813 (1) is automatically invalid if presented in connection with earlier litigation. The Court of Appeals in Panzeca expressly held that the content of the prior papers was inadequate to meet the statutory requirement because lacking certain essential information. 29 N.Y. 2d at 510-11. Having resolved the appeal on this basis, the Court of Appeals added the dictum on which defendants rely.

> The controlling statute distinguishes between an action and the filing of a claim, and the filing is a pre-condition to bringing the action. It is, therefore, no answer that the action or another action was brought within the time limit for the filing of a claim, and the action papers provide all the requisite detail and more. 29 N.Y. 2d at 510.

The words "an action" in the first sentence clearly refer to an action covered by section 3813, as, presumably, do the words "another action" in the second. The Court's reasoning appears to be, as was argued by the Board of Education,[14] that an earlier 3813 action would have suffered

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13/ Appellant's Brief, Panzeca v. Board of Education, p. 9.

14/ "[H]ad the original Complaint in the prior action pleaded a cause of action for money damages, or had plaintiff amended its Complaint to include a second cause of action for money damages, such original or amended Complaint would have been jurisdictionally

from the same defect as the later -- the absence of a prior presentation of the claim --, and that that inadequacy ought not be overcome because plaintiff filed a series of inadequate complaints rather than only one. This line of argument does not appear applicable to a rather unique case such as this, where the earlier action was not a defective § 3813 (or § 50-e) action but a good faith § 1983 case invulnerable to such defects.

For these reasons Panzeca v. Board of Education does not strip the courts of the discretion conferred by section 50-e(6) merely because the papers alleged to constitute a notice of claim were served in connection with prior litigation.

2. The District Court Did Not Abuse Its Discretion In Holding That Plaintiff Had Complied With Section 50-e

Plaintiffs maintain that nine different documents constituted, individually or in some combination, an adequate notice of claim. Defendants question the sufficiency of each of these documents on one or more of various grounds. Defendant cannot seriously question that at least three documents -- the original complaint, the first amended complaint, and the Lefcourt affidavit of May 1969 -- were timely received by the Corporation Counsel. Defendant does challenge the adequacy of the contents of these documents,

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14/ continued

defective, as no claim was ever presented to the Board of Education prior to the commencement of that action. Certainly, the result should be no different simply

though that is a matter over which the District Court had considerable discretion under section 50-e(6). Defendant challenges either the service or timeliness of the other six documents, posing questions as to which the District Court's discretion was doubtless narrower.

Plaintiffs maintain that the District Court did not abuse its discretion in deeming adequate the first three documents, that the other six documents were adequately and timely served, and that even if the service of one or more of the latter six was not technically correct or timely, the existence and service, such as it was, of those documents lend further support to the District Court's exercise of discretion with regard to the other documents.

a. Contents of the Documents Served

Section 50-e(2) provides that a notice of claim must set forth 4 items of information: (1) the name and address of each claimant and his attorney, if any (2) the nature of the claim, (3) the time when, place where, and the manner in which the injuries arose, and (4) the

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14/ continued

because plaintiff commenced two separate actions." Appellant's Brief, Panzeca v. Board of Education, p. 9 (Appendix references deleted).

items of damage or injuries claimed to have been sustained so far as then practicable. In providing notice under section 50-e a claimant must fashion his own document from a reading of the general terms of the statute, since New York City, unlike other jurisdictions, does not publish a form detailing the information it wants. See Cal. Gov. Code § 910.4.

Each of the nine documents relied on by plaintiff contains a reasonabe explanation of the inadequate medical treatment, the time, place and manner of occurrence and the injuries suffered, as well as disclosing Berry's name and location. See pp. 31a-32a, 39a-40a, 46a, 54a-56a, 60a, 63a-66a, 68a-76a, 86a-93a, 96a-98a, 100a-102a. The District Court correctly concluded that the original complaint contained all the information required by section 50-e(2). The same is true of the other documents set out in the Appendix.

As to the documents other than those served on or about July 10, 1970, which defendants claim were untimely, the defendants object that the documents did not disclose that Berry was complaining of "medical malpractice," as opposed to, for example, aviolation of his civil rights. Appellants' Brief, pp. 9-11. Defendants in effect ask the Court to engraft on to section 50-e a requirement that an aggrieved patient, having described in a common sense way the fact that he is sick and is not getting the treatment he needs, also label his problem "malpractice." Such technical rules were abolished in New York when it adopted

the Field Code and ended common law pleading a century ago.

Had plaintiff added a heading reading "Notice of Claim - Malpractice" the City would apparently have been satisfied with the content of some if not all of the disputed documents. There is little reason to suspect that the addition of these four words would have been of the critical significance defendants now assert. The original and first amended complaint alleged a cause of action against the Commissioner of Corrections, seeking damages for Berry in the amount of $500,000. Pp. 46a, 60a. The Corporation Counsel was obligated by law to investigate and defend this claim against the Commissioner, and did so. The facts bearing on Berry's claim against the doctors are essentially the same as those bearing on his claim against the Commissioner. The Corporation Counsel does not claim he neglected to look into the facts of the original claim because he didn't care if the Commissioner lost, or that he would have done a better job had he known that the doctors or the City itself might be liable. Similarly the habeas corpus actions sought to compel the Commissioner to end the alleged mistreatment of Berry. The allegations regarding Berry were extremely serious and of a sort that would prompt any responsible attorney representing the Commissioner to inquire as to their truth. The City does not contend that it was perfectly content to let continue without redress or change a grave violation of Berry's

rights, but would have taken the matter far more seriously if it had thought that violation might cost the City or its medical employees any money.

Under these circumstances the District Court clearly did not abuse its discretion in deciding to disregard any technical defects in the content of the documents.[15/]

b. Manner of Service

In the District Court the defendants did not question that the documents relied on by plaintiffs had in fact been served on or received by the official designated by law, in this case the Corporation Counsel. C.P.L.R. § 311(2). On appeal, however, the defendants appear to deny this allegation. Defendants allege the earlier "complaints" in this action were served "only on the Commissioner of Corrections", and intimate they were never forwarded to the Corporation Counsel. Appellants' Brief, p. 9,n. They further allege that the defense of the various habeas corpus proceedings was handled by the District Attorney's office "as mandated," and intimate that the Corporation Counsel was never aware of these proceedings or saw the relevant documents. Appellants' Brief, p. 11.

These allegations are squarely refuted by the record. The original complaint in this action was indeed

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15/ Section 50-e(2) requires that the notice be under oath. Six of the documents at issue were under oath; three -- the original complaint, the first amended complaint, and the notice of motion -- were not. This a defect readily disregarded under subdivision 6, and defendants do not object to the documents on this basis.

served upon the Commissioner of Corrections on November 10, 1969, but he in turn promptly forwarded the original complaint to the Corporation Counsel. On November 20, 1969, the Corporation Counsel served on plaintiffs a Motion for a More Definite Statement, to Separate Claims and to Strike Immaterial and Scandalous Matter, referring to various provisions of the original complaint including the specific allegations regarding Berry.[16] On December 1, 1969, plaintiffs filed their First Amended Complaint, 1a, and, since the Corporation Counsel had already entered the litigation, served it directly on the Corporation Counsel's office. Thereafter all the litigation in the instant case was handled, or participated in, by the Corporation Counsel.

Defendants' allegations regarding the habeas corpus proceedings raises different problems. The only direct evidence on this point in the record is defendants' Motion For a More Definite Statement of November 20, 1969, to which motion the Corporation Counsel had annexed copies of papers and decisions in earlier habeas corpus and criminal proceedings. If the Corporation Counsel did not "handle" the defense of these proceedings, he at least was being furnished with copies of the papers filed by Berry and the other plaintiffs.

The responsibility for defending civil actions regarding prison conditions in city institutions is imposed on, and has traditionally been borne by, the Corporation Counsel. The New York City Charter, Chapter 16, § 394(a),

[16] The motion was returnable on December 3, 1969. See 1a.

provides:

> Except as otherwise provided by law, the corporation counsel shall be attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies in which the city is interested.

Litigation in both the federal and state courts regarding conditions in New York City prisons and other institutions has in fact long been handled by the Corporation Counsel. See e.g. Bach v. Kross, 5 Misc. 2d 257, 165 N.Y.S. 2d 1014 (S. Ct. Bronx County 1957); Rhem v. Malcolm, 371 F.2d 594 (S.D.N.Y. 1974). The essence of defendants' contention seems to be that because of the unusual interest of the Manhattan District Attorney in these particular defendants, the Corporation Counsel agreed to share with, or delegate to, that District Attorney's office the Corporation Counsel's responsibility to defend litigation challenging the practices of the Department of Corrections in four boroughs.[17/] Without regard to the wisdom of this practice,[18/] service on the Corporation Counsel is not made on Mr. Burke (then Mr. Rankin) personally, but on attorneys designated to act in his stead. The Corporation Counsel, having undertaken such a relationship with the District Attorney's office with

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17/ Plaintiff Berry was kept in institutions in Manhattan and Queens. Other defendants were in those boroughs as well as Brooklyn and the Bronx. Whether the plaintiffs should have been deliberately scattered among six different prisons was one of the questions raised by the original complaint.

18./ New York law appears to contemplate the possibility of joint defense of a habeas corpus proceeding. Notice of a habeas corpus proceeding must be served, not only on the official having custody of the petitioner, C.P.L.R. § 7005,

regard to plaintiffs, cannot be heard to object that service on the District Attorney was improper. Compare Avery v. O'Dwyer, 110 N.Y.S. 2d 569, 201 Misc. 989 (Supreme Ct., N.Y. County, 1952).

C. Timeliness

Defendants question the timeliness of two documents, the Notice of Motion (95a-98a) and the Shapiro Affidavit (99a-102a), both dated July 10, 1970. The timeliness of these documents is of particular importance because, subject to the argument regarding Panzeca v. Board of Education, supra, defendants do not question the adequacy of the contents of these documents or the method of service.

Certain facts bearing on the timeliness of these documents are not contested. Defendant Collins, a physician on the medical staff of the Manhattan House of Detention, was not involved in the treatment of Berry after his transfer from that institution in November, 1969. Berry was transferred from Rikers Island to the Bellevue prison ward on March 19, 1970. All treatment by city physicians ended on April 23, 1969, when Berry was discharged from the Bellevue prison ward. In addition, defendants do not appear to deny that under New York law a cause of action for malpractice

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18/ continued

but also on the district attorney for the county from which the prisoner was committed (here New York County) and the district attorney for the county in which the petitioner is detained (here New York or Queens County depending on whether petitioner was at the Manhattan House of Detention or Rikers Island).

accrues, and the 90 days for a section 50-e notice begins to run, only when the course of treatment is completed, not from the date or dates of discreet acts of malpractice. Borgia v. City of New York, 237 N.Y.S. 2d 319, 12 N.Y. 2d 151 (1962); Armstrong v. City of New York, 240 N.Y.S. 2d 663, 39 Misc. 2d 445 (Supreme Ct., Kings County, 1951).

The timeliness of the July 10 documents turns on two questions. The first is a question of fact, whether defendant Plew, then Deputy Medical Director of the New York City Department of Corrections, did or should have exercised any responsibility over prisoners in the Bellevue prison ward. The second is a question of law, whether section 50-e contemplates a separate "course of treatment" for each doctor, ending when the doctor terminates involvement with the case, or a single "course of treatment" running to the end of treatment by city physicians as such. Defendants' assertion that plaintiffs have conceded the untimeliness of the July 10 documents is not correct. Compare Appellants' Brief, pp. 4, 9 with Appendix, p. 20a. If defendants prevail on both questions the 90 days would run from March 19, 1970, and the two documents would be untimely; if plaintiffs prevailed on either question, or both, the 90 days would run from April 23, 1970 and these documents would be timely.

The question of fact regarding Plew's relationship with the Bellevue prison ward is complicated because defendants did not contend in the District Court, as they do here, that Plew's "involvement" ended when Berry was transferred to the

prison ward on March 19, 1970. Assuming arguendo that such a contention can be raised at this stage, the record does not support it. The Bellevue prison ward is a facility of the New York City Department of Corrections, and is under the general control and supervision of a warden P. 100a. The affidavit of Jonathan Shapiro, dated July 10 1970, specifically states that Plew, as Deputy Medical Director, was responsible for the medical care of inmates in all such Department of Corrections facilities. P. 101a. On November 12, 1971, the Manhattan District Attorney, then a co-defendant in this action, submitted an affidavit alleging that the care and treatment of prisoners awaiting trial was the sole responsibility of the Department of Correction and therefore not within his control. See p. 4a. On December 12, 1969, defendant Plew prepared for the Commissioner of Corrections a memorandum regarding "Inmate Lee Berry, Bellevue Hospital Prison Ward," describing, inter alia, the details of Berry's treatment during two visits to the ward. Berry's medical records while a prisoner further indicate that the treatment of prisoners in the Bellevue prison ward was a matter in fact under the aegis of the Department of Corrections.[19/] In light

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19/ The records, obtained by plaintiffs as part of discovery, reveal that a prisoner's medical records are kept on but a single Department of Corrections form regardless of whether the prisoner is in Bellevue, that his "clinical history" is kept on a chart headed "The City of New York, Department of Correction, _____ Hospital," and that consultation requests regarding Berry were on a Department of Correction form in which the "Correction Department Institution" was described as "B.H.P.W.," presumably standing for "Bellevue Hospital Prison Ward".

of this evidence defendants' condition that Doctor Plew, as Deputy Medical Director, did not and could not have exercised any control or influence over Berry's treatment in the Bellevue prison ward cannot be sustained.

Even if Plew was in no way connected with the Bellevue prison ward, this is only relevant if the "course of treatment" is calculated separately for each doctor, rather than once for all treatment involving city doctors. If this were an action in state court against the City of New York directly, it is clear that the course of treatment would be deemed to end on April 23, 1970, when Berry left Bellevue for a private hospital. This would be the case regardless of whether the negligent act occurred long prior to discharge or whether Berry had been treated by a series of different doctors. See Borgia v. City of New York, 237 N.Y.S. 2d 319, 12 N.Y. 2d 151 (1962). Berry could have filed a notice of claim with the City on July 10 and sued the city in state court shortly thereafter. In the instant case, however, because of the limitations of federal jurisdiction, the malpractice action is nominally against the individual doctors, although the City of New York is the real party in interest and as such is defending the action. No reason appears, however, why the identity of the nominal defendant in a subsequent lawsuit should affect the date on which the "course of treatment" should be deemed to end. Neither the interests of the City nor judicial economy would be served by calculating a different course of treatment for each doctor and requiring a separate notice

of claim for each physician. Such a special rule for plaintiffs who named individual doctors rather than New York City as the nominal defendant would merely penalize aggrieved patients who failed to forsee the technical form in which their litigation would be cast.

Since defendant Plew was indeed involved in or responsible for the Bellevue prison ward, and since the course of treatment would run until April 23, 1970, regardless of who was responsible for the prison ward, the July 10 documents were timely.

d. Investigation by City Employees

The District Court found that, in connection with the various affidavits and other documents served prior to the Second Amended Complaint, the City had in fact examined various persons with information bearing on Berry's claim. P. 11a. That there were indeed extensive investigations of those claims of malpractice and of Berry's medical condition is well supported by the record.

As early as May, 1969, as a result of the first hebeas corpus petition regarding Berry's treatment, Joseph Rieber of the Department of Corrections conducted an investigation and sent a report to the District Attorney regarding Berry's medical treatment and history.[20/] Following

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20/ Letter of Frederick Rieber to Joseph Phillips, May 12, 1969, p. 5. This is among the documents produced by defendants as a result of discovery in this action.

the filing of the original complaint in this action, the Commissioner of Corrections, at the instance of the Corporation Counsel, conducted his own investigation into the relevant facts, including Berry's medical treatment and condition. The Commissioner in turn obtained two written reports from the Deputy Medical Director of the Department dealing exclusively with Berry's medical problems.[21] On the basis of these investigations the Commissioner prepared an extensive affidavit summarizing his findings, and provided the affidavit to the Corporation Counsel.[22] In November of 1970 and June of 1972, in answering the allegations of medical malpractice in the second amended complaint, the Corporation Counsel did not claim insufficient informtion on which to form a belief, but denied the allegations and expressly referred to the affidavit filed in 1969 by the Commissioner of Corrections.[23]

21/ Memorandum of Ralph V. Plew, May 9, 1969; Memorandum of Ralph V. Plew, December 18, 1969.

22/ The Corporation Counsel filed that affidavit and the Plew memoranda on December 31, 1969, in opposing the issuance of a preliminary injunction in the instant case. See p. 1a.

23/ See e.g. Answer of Defendants McGrath, Principe, Accocella, Plew and Collins to the second amended complaint, ¶ 17, filed November 10, 1970.

The medical records kept by the Department of Corrections, and produced through discovery, reveal that, in the period from the filing of the first habeas corpus petition to his release on bail, Berry was examined by doctors or nurses employed by the City on scores of occasions. Written recrods were made of these investigations, as well as of the treatment being given to Berry. In addition the information obtained by private doctors who examined Berry was promptly disclosed during this period to the City in the form of detailed affidavits. See 67a-76a. If these investigations, records, and affidavits were deemed inadequate by the Corporation Counsel, his office had direct access to all those who had treated Berry, since they were all city employees, as well as ready access to Berry himself, who was imprisoned in city institutions and perforce available for depositions or physical examinations.

Defendants' suggestion on appeal that no investigation was ever made of Berry's claims of medical mistreatment[24/] is refuted, not only by the record, but by the history of this litigation. For almost a year, while Berry languished in city institutions, his lawyers fought in this and other litigation for judicial intervention. Throughout that period, and most particularly in the early stages of the instant case, the City insisted with equal vehemence that it knew what was going on, that the allegations of mistreatment were unfounded, and that judicial relief was

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24/ Appellants' Brief, p. 11.

unwarranted. Surely the City cannot now be heard to argue, several years later, that it never bothered to investigate the charges it denied or to inquire as to the need for the judicial relief it opposed.

e. Other Considerations

In addition to the above considerations, a number of other factors render particularly appropriate the District Court's exercise of discretion in favor of plaintiff. The conditions under which the plaintiffs were imprisoned and treated were no ordinary private controversy; they occurred in the context of a celebrated trial that attracted national attention. Any well informed resident of New York City in the years 1969-70, not excluding the Corporation Counsel, was aware that there were problems in this regard. No serious claim is advanced that the City was prejudiced by the form of notice in this case. The earlier documents served on the City in fact provided far better notice than the usual notice of claim, for they informed the City of the medical malpractice before most of it had occurred and before the most serious injuries had been suffered. Thus the City was afforded, not merely an opportunity to investigate the malpractice while it was still in progress, but an opportunity -- regrettably unused -- to stop it. During the period in question Berry was incarcerated, and thus subject to the alleged malpractice, not because he was convicted of any crime, but because he was poor. Or, more precisely, because Berry, continually

hospitalized and living off an Army disability allowance, could not hope to meet the $100,000 bail set at the request of state prosecutors. The complaint alleges, and the history of this case certainly suggests, that the defendant doctors did not mistreat Berry from mere personal incompetence, negligence, or whim, but acted consistent with a general pattern of indifference on the part of City and State officials towards the civil rights of the plaintiffs. Defendants could and should have raised any objection that Berry had failed to comply with section 50-e in July, 1970, when plaintiffs moved to add the malpractice claim, or in September, 1970, when defendants moved to dismiss the second amended complaint, rather than waiting until early 1974 when extensive discovery had been undertaken and the case was ready for trial.

Under these circumstances it was certainly within the discretion of the District Court under section 50-e(b) to disregard any defects in the various notices given to the City and to hold the City liable to indemnify the defendant's doctors.

II. THE DOCTORS ARE ENTITLED TO INDEMNIFICATION FOR ANY JUDGMENT OBTAINED FOR A VIOLATION OF PLAINTIFF'S FEDERALLY PROTECTED CIVIL RIGHTS.

Plaintiffs maintain that the conduct of the defendant doctors constitutes more than ordinary malpractice, and rises to the level of cruel and unusual punishment in violation of the Eighth Amendment. Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970). For such a violation of plaintiff Berry's federally protected rights the defendant doctors would be liable under 42 U.S.C. § 1983 regardless of whether Berry had complied with the § 50-e prerequisites to litigating a state malpractice claim. The second question presented by this appeal is whether, if Berry wins a judgment against the doctors for a violation of his federally protected civil rights, the doctors will be entitled to indemnification by New York City even though Berry may not have complied with the provisions of § 50-e. Plaintiffs maintain the doctors would be entitled to indemnification under such circumstances. 25/

25/ Plaintiffs advanced in the District Court this argument as a basis for indemnification. Pp. 14a, 22a-26a. It is unclear whether the District Court rejected this ground for indemnification or never considered it. Compare p. 10a with p. 12a. Plaintiffs, having prevailed below in obtaining a decision that the city is obliged to indemnify the doctors, are entitled to advance any ground in support of indemnification without filing a cross-appeal. Dandridge v. Williams, 397 U.S. 471, 475, n. 6 (1970); United States v. Raines, 362 U.S. 17, 27 (1960).

That section 50-e has no application to a federal civil rights action was not questioned by defendants in the District Court. A similar question has arisen in the Ninth Circuit under a virtually identical California statute. In Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969), the plaintiff claimed he had been robbed by four police officers who, because of his race, wished to prevent him from making bail. The California Tort Claims Act[26] required that, before commencing any action against a public official, the claimant must first file a notice of that claim with the city, a procedure plaintiff had not followed. The Ninth Circuit nevertheless upheld the plaintiff's cause of action under 42 U.S.C. § 1983. "While it may be completely appropriate for California to condition rights which grow out of local law and which are related to waivers of the sovereign immunity of the state and its public entities, California may not impair federally created rights or impose conditions upon them." 418 F.2d at 704-05. See also Donovan v. Reinbold, 433 F.2d 738, 741 (9th Cir. 1970). The provisions of sections 50-d and 50-e do not purport to,[27] and could not, limit the

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26/ Cal. Gov. Code § 911.2.

27/ Section 50-d provides that prior to maintaining an action "under this section" the plaintiff must comply with section 50-e. Berry's section 1983 federal claim is not a state

vindication of plaintiff Berry's constitutionally protected rights.

The more difficult question is whether a doctor's right to indemnification for a § 1983 judgment is cut off if the aggrieved patient fails to file a notice of claim within 90 days of the § 1983 violation. In an ordinary malpractice case this question never arises, since compliance with section 50-e is a precondition of the malpractice suit itself, so that in any successful malpractice action there must ipso facto have been compliance with section 50-e. See Derlicka v. Leo, 259 App. Div. 607, 19 N.Y.S.2d 949 (1st Dept. 1940), aff'd 284 N.Y. 707, 31 N.E.2d 47. The question is one of first impression, the problem not having arisen before in New York or any of the other states with similar statutes.

The statute does not on its face appear to strip physicians of their right to indemnification where an aggrieved patient brings a section 1983 action without complying with section 50-e. Section 50-e(i) provides that the notice of claim must be filed within 90 days after the claim "arises," and must be sworn to by or on behalf of "the

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27/ Continued

action under section 50-d. The California statute held inapplicable to a § 1983 action in Willis purported on its face to cover any cause of action against a public employee. Cal. Gov. Code § 950.2.

claimant." Insofar as the claim is made against the city by an aggrieved patient, the claim "arises" at the end of the course of treatment and the notice would have to be sworn to by or for the patient. But the question raised by this case deals not with the claim of the patient for damages but with the claim of the doctor for indemnification. The doctor's claim does not arise until and unless the patient obtains a judgment against him, and the doctor's notice of claim would have to be sworn to by, or for, the doctor rather than the patient.

The New York courts have repeatedly distinguished between the time and contents of a notice of claim to be filed by the original tort victim and by a joint tort feasor seeking indemnification. In Valstrey Service Corporation v. Board of Elections, 161 N.Y.S.2d 51, 2 N.Y.2d 413 (1957), Valstrey was sued by an individual who, while attempting to reach an election booth of the Board's, fell into a hole previously dug by Valstrey. Valstrey sought to join the Board of Elections, an agency of Nassau County, as a third party defendant, claiming that it was merely a passive tort feasor and was entitled to indemnification by the Board of Elections whose active negligence had caused the injury. The Board objected on the ground that neither the individual plaintiff nor

Valstrey had filed a notice of claim within 90 days of the accident. The Court of Appeals permitted the addition of the Board and County. Referring to section 50-e, and a similar provision of County law, the Court held,

> [B]oth of these actions contemplate the filing of such a notice after the cause of action against the county shall have arisen. The brief for the county upon this appeal concedes that Valstrey's cause of action, if any, against the county does not accrue until Valstrey is cast in judgment by a verdict in favor of the injured plaintiff. It is conceded that not until then could Valstrey's claim arise against the county.
>
> Whether such a claim would arise upon the entry or payment of a judgment against Valstrey, it is plain from the language of both section 52 of the County Law and of section 50-e of the General Municipal Law that no filing of claim by Valstrey against the county is required in order to maintain the third-party action.

161 N.Y.S.2d at 54, 2 N.Y.2d 415-416. See also Zillman v. Meadowbrook Hospital Co., Inc., 342 N.Y.S.2d 302, 305, 73 Misc.2d 726 (1973). If indemnification can be sought by third party practice before the indemnitee's claim actually arises, a fortiori it can be sought thereafter provided the indemnitee files a timely notice of claim after judgment is entered against him.

Section 50-d was enacted to encourage physicians and other medical personnel to work at public institutions.

Schmid v. Werner, 277 App. Div. 520, 100 N.Y.S.2d 860 (1st Dept. 1950), aff'd 303 N.Y. 754, 103 N.E.2d 540. If the law were construed not to cover serious malpractice which, because it happened to involve a prisoner, gave rise to a federal claim, its salutary effect would be necessarily impaired. There is nothing in the statute, on its face or as construed by the state courts, to suggest that New York intended to deny indemnification because the malpractice was egregious, because it involved prisoners, or because a doctor, on his own initiative or at the direction of his superiors, decided to deny treatment to a man because he was a brutal criminal, a Black Panther, or otherwise deserving of punishment.

Similarly, the prophylactic effect of section 50-d would be considerably undermined if a doctor's right to indemnification for a § 1983 claim could be cut off merely because the aggrieved patient, over whom the doctor had no control, failed to file a notice of claim. Such a limitation would particularly deter doctors from treating poor uneducated patients, unlikely to know personally, or through counsel, of the requirements of section 50-e. The teaching of Derlicka v. Leo, supra, is that the legislature intended the coverage of section 50-d indemnification to be coextensive with the

areas in which city doctors faced with malpractice liability. Where, as here, a patient's failure to comply with section 50-e does not relieve a doctor of liability under section 1983, that failure should not relieve the City of its liability to indemnify the doctor.

CONCLUSION

For the above reasons, the decision of the court below, holding the City of New York liable to indemnify the defendants Plew and Collins, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of February, 1975, I served two copies of the Brief for Appellees by depositing them in the United States mail, first class postage prepaid, addressed to Murray L. Lewis, Assistant Corporation Counsel, Municipal Building, New York, New York 10007.

Eric Schnapper
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